THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS: A COMMENTARY.
PART FOUR

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This is the fourth in a series of articles in which the authors examine the Consumer Protection from Unfair Trading Regulations 2008 and their impact on the travel industry in the UK.

Introduction

In this article we move on to examine the first of the five offences created by Part 3 of the CPR. This is the offence under Regulation 8 of engaging in 'unfair commercial practices', one of the five unfair commercial practices prohibited under Regulation 3.

Regulation 8

Regulation 8 provides:

Offences relating to unfair commercial practices

8. (1) A trader is guilty of an offence if –

(a) he knowingly or recklessly engages in a commercial practice which contravenes the requirements of professional diligence under regulation 3(3)(a); and

(b) the practice materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product under regulation 3(3)(b).

(2) For the purposes of paragraph (1)(a) a trader who engages in a commercial practice without regard to whether the practice contravenes the requirements of professional diligence shall be deemed recklessly to engage in the practice, whether or not the trader has reason for believing that the practice, might contravene those requirements.

A prosecution will only succeed if it can be shown that a trader knowingly or recklessly engaged in a commercial practice

The wording of Regulation 8 means that to be guilty of the offence of engaging in unfair commercial practices under the general prohibition set out in Regulation 3 a trader must satisfy both (1)(a) and (b) and therefore a prosecution will only succeed if it can be shown that a trader:

- Knowingly or recklessly
- Engaged in a commercial practice
- Which contravened the requirement of professional diligence, and
- The practice distorted or was likely to have materially distorted the economic behaviour of the average consumer with regard to the product

We have already discussed the meaning of 'commercial practice' 'professional diligence' and

distortion of economic behaviour in previous articles so we will be confining ourselves to a discussion of 'knowingly or recklessly in this article.

Knowingly and recklessly

This offence is the only offence in the Regulations which is not a strict liability offence. Regulation 8 is a *mens rea* offence. To be guilty of an offence a 'guilty mind' would need to be established by the prosecution. At paragraph 12.5 of the Guidance on the UK Regulations published by the BERR (the Department for Business Enterprise and Regulatory Reform, now BIS the Department for Business Innovation and Skills) ('the Guidance') it states:

> *For a person to be convicted of a contravention of the general prohibition, which is a mens rea offence, it must also be shown that he had a specified state of mind. The specified state of mind will be knowledge or recklessness ...*

The Guidance goes on to further clarify at paragraph 12.6:

> *In the case of a prosecution for contravening the general prohibition, the mental element ('knowingly or recklessly') only needs to be shown in relation to contravention of 'the requirements of professional diligence'. It does not need to be shown in relation to the effect on the average consumer, assessed against the material distortion and transactional decision concepts.*

Accordingly, only Regulation 8(1)(a) is subject to the requirement to prove a guilty mind. Regulation 8(1)(b) is a simple objective test as to whether or not the behaviour of the consumer has been affected.

The words 'knowingly and recklessly' are not new to consumer protection legislation. They were used in s.14(1) of the Trade Descriptions Act 1968 (TDA) and were extensively examined is a series of cases, sometimes with controversial results.

The wording in s.14 diverges in a small but significant manner from Regulation 8 and therefore it would be dangerous to assume that the caselaw is applicable to Reg. 8 but it is nevertheless instructive to look at the caselaw under s.14 to see how cases under Reg. 8 might be decided.

The words 'knowingly and recklessly' are not new to consumer protection legislation

Section 14(1) Trade Descriptions Act 1968 stated:

> *It shall be an offence for any person in the course of any trade or business –*
>
> *(a) To make a statement which he knows to be false; or*
>
> *(b) Recklessly to make a statement which is false; .....*

Knowingly

On the issue of 'knowingly' the leading TDA case is a House of Lords case, *Wings v Ellis* [1984] 1 All ER 1046, which was discussed in the first of this series of articles at [2010] TLQ 29. The facts of the case were that the defendant tour operator, Wings, published a brochure in early 1981 advertising holidays for the 1981–82 season. Unfortunately there was a mistake in the brochure. It stated that a particular hotel had air-conditioning when in fact it did not. Wings did not discover this until May 1981. At that point they issued errata to all existing clients and instructed all telephone sales staff to inform travel agents and prospective clients of the error before bookings were made. At least one client, however, was not told of the lack of air-condi-

tioning before travelling. On his return home he complained to his local trading standards department who subsequently brought a prosecution under section 14(1)(a). Under that section it was an offence for a person 'to make a statement which he knows to be false'. The problem was that Wings knew the statement was false but they didn't know they were making it. Ultimately the case made its way to the House of Lords on the difficult issue of whether Wings could be convicted when, in reality, they had no *mens rea*. In convicting Wings the House of Lords conceded that although this was a case normally requiring *mens rea* a literal interpretation of the offence turned it into one of 'semi-strict liability' (Lord Scarman).

If a prosecution were to be brought today on the same facts, but under Reg. 8 of the CPR, would it succeed? The prosecution would have to show that Wings 'knowingly' engaged in a commercial practice which contravened the requirements of due diligence. Put more broadly: Did they know they were doing something which was not commensurate with them exercising the degree of honesty or good faith expected from a trader in that field?

They certainly knew that the brochure contained an error but they did not know that the error was being disseminated because they had taken steps to prevent this. On that basis they would not be guilty of the offence today if prosecuted under Reg. 8. This is not to say however that they would not be guilty under any of the other provisions. Indeed a prosecution under Reg. 8 would probably not be seriously considered today given the other, strict liability, offences that exist.

But if we return to one of the examples used previously in Article Three at [2010] TLQ 223, that of the hotel that posted favourable reviews on Tripadvisor written by its own staff, would that contravene Reg. 8? If we ask the same question as above would we get the same answer? – Did they know they were doing something which was not commensurate with them exercising the degree of honesty or good faith expected from a trader in that field According to the Guidance (para. 10.5) professional diligence is an objective standard and therefore if it could be said objectively that what they were doing was not commensurate with being honest or acting in good faith then so long as they knew they were doing it they would be guilty. As already indicated in the previous article it is the authors' view that this would fail the professional diligence test – and therefore it follows from this that the hotel would be guilty of a Reg. 8 offence. The danger here for the hotel is that although they do not believe that what they are doing is wrong, they certainly *know* that they are doing it – but their belief in the righteousness of their conduct will not avail them.

> A belief in the righteousness of their conduct will not avail

The same principles would apply to one of the other examples used in Article Three at [2010] TLQ 223, that of the websites operated by no frills air carriers. *If* it could be established that the complexity and ambiguity of the website amounted to a breach of professional diligence because it was not commensurate with 'the general principle of good faith in the trader's field of activity' then a conviction could very easily follow, given that the airline would *know* that it was engaging in that practice.

What of the cruise line that advertises a headline price on its website but does not give any indication that port charges are not included until a very late stage in the booking process? This is just the kind of practice that the no frills airlines have been vilified for, and if it amounts to a failure of professional diligence, would also lead to a conviction.

Recklessly

'Recklessly' in the CPR will certainly have the

meaning given to it in other areas of the criminal law where it connotes dishonesty on the part of the defendant but what is significant in the CPR, as with the TDA, is that the word is given an extended meaning. Regulation 8(2) provides:

> *(2) For the purposes of paragraph (1)(a) a trader who engages in a commercial practice without regard to whether the practice contravenes the requirements of professional diligence shall be deemed recklessly to engage in the practice, whether or not the trader has reason for believing that the practice, might contravene those requirements.*

Under the TDA recklessness was defined in much the same way. Section 14(2)(b) provided:

> *(b) a statement made regardless of whether it is true or false shall be deemed to be made recklessly, whether or not the person making it had reasons for believing that it might be false.*

If we make the assumption that 'without regard' under Reg. 8 will be interpreted in the same way as 'regardless' under s.14 then the caselaw on recklessness under s.14 will be equally relevant to Reg. 8.

Two cases under s.14 of the TDA are particularly instructive in this regard. Neither is a travel industry case but both illustrate vividly the impact of this extended definition. The first is *MFI Warehouses Ltd v Nattrass* [1973] 1 All ER 762. In this case the defendants had published an advertisement in which the price and delivery terms on which some furniture was available were ambiguous. On one interpretation the advertisement could be understood to mean that the furniture was available on certain terms when in fact it was not. MFI were prosecuted under s.14(1)(b) as having recklessly made a false statement as to the provision of a facility. The advertisement had been drafted by a director of the company and approved by the chairman. The latter had considered the advertisement for five to ten minutes but had not directed his mind as to whether the advertisement contained statements which were false. The magistrates convicted and the defendants appealed to the Divisional Court. The issue on appeal was whether the actions of MFI could be regarded as reckless within the meaning of the Act.

The defendants had published an advertisement which was ambiguous

Lord Widgery CJ said that normally recklessness involved dishonesty and that according to the usual meaning attached to the word MFI would not be guilty. Despite existing case law on the meaning of recklessness in other contexts Lord Widgery felt constrained to ignore it and base his decision on the definition in the Act. Taken literally it meant that recklessness amounted to no more than *not having regard to* the truth or falsity of the statement. Seen in this light the actions of the chairman who considered the advertisement for five to 10 minutes but did not think about whether it was true or false amounted to recklessness and the company had been properly convicted. As with the *Wings* case the judge justified his decision by saying that this was a consumer protection statute and that it was not unreasonable to impose on the advertiser a positive obligation to have regard to whether his advertisement was true or false.

Dixons Ltd v Roberts 82 LGR 689 took this development a stage further. In that case an advertisement had been prepared which contained a false statement. This advertisement had been amended by the company secretary. Unfortunately, the amended advertisement also contained a false statement but the company secretary had not considered the possibility that the amended advertisement could be false. Upholding the justices on this point Forbes J said:

> *The justices finding of fact indicates quite clearly that they considered that it was this amended statement which he [the company secretary] did not sufficiently think through. [T]he explanation of their decision is thus that they considered that the company secretary did not have regard to the falsity or otherwise of the amended statement. In my view the justices were right to conclude that the defendants had recklessly made a statement which was false.*

It is clear that in neither of these two cases were the defendants reckless in the normal sense of the word. They were in fact no more than negligent or careless. The implications of this for brochure preparation are patent. A tour operator cannot afford any form of sloppy practice to creep in to the process unless he wishes to invite a prosecution.

In neither of these two cases were the defendants reckless in the normal sense of the word

A straightforward tour operating case under the TDA which illustrates the requirement of recklessness is *Best Travel Company Ltd v Patterson* (1986) (unreported). This was an unsuccessful appeal from a decision of the magistrates to convict. The facts were that Best Travel, trading under the name of Grecian Holidays, published a brochure in November 1983 featuring the Palace Hotel, Malia, Crete. The brochure stated that the hotel facilities included a bar, lounge and breakfast room. In January 1984 two clients booked a holiday at the hotel for September 1984. Just before they departed they were told that no bar, lounge or breakfast room existed at the hotel. On arrival they discovered that the ground floor of the hotel was no more than a building site.

Best had contracted with the hotel in July 1982 and the contract provided that the facilities would be completed by March 1983. By July 1983 the facilities had not been completed and Best knew this. Best had no further contact with the hotel until April 1984 when they were told that the facilities would be ready, i.e. they were not ready yet. Thus, between July 1983 and January 1984, when the clients booked, Best had no contact with the hotel and did not investigate whether the facilities had been completed. Yet they went ahead and published the brochure in November 1983 stating that the facilities existed, and the statements in the brochure were still being made, uncorrected, in January 1984.

The Divisional Court had little hesitation in agreeing with the magistrates that the circumstances in which the statement about the facilities was made amounted to recklessness by Best. If they had not investigated then they could not know whether the facilities existed and therefore they were making a statement 'regardless' of its truth or falsity. We are drawn inevitably to the conclusion that the case would be decided in the same way under Reg. 8. Not investigating the facilities before making the statement would be engaging in a commercial practice 'without regard' to whether in contravened the requirements of professional diligence.

One major aspect of this offence which we have not yet discussed is 'who' must have acted knowingly or recklessly. This issue will be discussed in the next article in the series but one of the leading cases on this point is *Airtours v Shipley* (1994) 158 JPN 319 (DC) which can usefully be discussed now on the issue of what amounts to recklessness. The facts were that Airtours had featured a hotel in one of their brochures that was said to have an indoor swimming pool. This was not the case. The hotel did not have and never had had an indoor swimming pool. Airtours conceded that the false statement had somehow crept into the brochure because of a mistake at head office—which they could not explain. This was despite an errata policy which the court described as an 'excellent system'. For reasons which will be discussed more

fully in the next article Airtours were found not guilty because their 'excellent' errata system demonstrated that they had not acted recklessly.

However it is interesting to speculate on what might have been the outcome of the case if the errata system had not been so good. What if the company had merely issued a general instruction to staff that the brochure was 'not to contain inaccuracies' and then left them to get on with it? Have they engaged in a commercial practice without regard to whether it contravened the requirements of professional diligence? Have they thought about whether what they are doing meets the standard of skill and care which could reasonably be expected of them if they are acting in accord with honest market practice or general principles of good faith in their industry? At one level 'yes'; they have given consideration to the fact that the brochure should not contain inaccuracies and they have given instructions to that effect. But is that enough? Such a general exhortation would come nowhere near the kind of errata systems employed by leading tour operators as exemplified by the *Airtours* case itself. If they had properly had regard to what amounted to professional diligence could they have ended up with such an amateurish system? It is certainly not beyond doubt that such a crudely devised system could give rise to a finding of recklessness as defined in the Regulations.

The next article in this series will continue the discussion of this offence.

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